

## 10 Official Opinions of the Compliance Board 31 (2016)

### ◆ 1(C)(3) OUTSIDE ADMINISTRATIVE FUNCTION EXCLUSION - PLACEMENT OF MONUMENT, WHEN NOT ADDRESSED BY PRE- EXISTING POLICY

\*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at [http://www.oag.state.md.us/Opengov/Openmeetings/OMCB\\_Topical\\_Index.pdf](http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf)

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May 4, 2016

Re: Talbot County Council  
Deborah A. Jeon, Richard Potter, *Complainants*

Complainants Richard Potter, president of the Talbot County Branch of the NAACP, and Deborah A. Jeon, on behalf of the ACLU of Maryland, allege that the Talbot County Council violated the Open Meetings Act by deciding in a closed meeting that a statue dedicated to the “Talbot Boys” would not be removed from the courthouse grounds.

The “Talbot Boys,” the submissions explain, were 84 Talbot County residents who died in the Civil War fighting for the Confederacy. The NAACP Chapter had asked the Council to remove the statue and replace it with a monument dedicated to the soldiers who fought on both sides of that conflict. Another possibility was to retain the statue and add a separate monument dedicated to county residents who had fought for the Union.<sup>1</sup> According to the complaint, the Council had met publicly with community groups and members of the public to hear their views on what to do with the statue, but then decided the matter in a closed session held without notice to the public. The Council announced its decision not to remove the statue and to accept applications, in accordance with its policy for the placement of monuments on courthouse grounds, for the placement of a statue dedicated to the county’s Union soldiers.

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<sup>1</sup> The minutes of the Council’s August 11, 2015 meeting state that on July 29, 2015, the Council met with representatives of the Talbot County Branch of the NAACP, who presented “recommendations with regard to the statue for Council’s consideration as follows: (1) to remove the statue from the Courthouse lawn and place it in a more appropriate setting; to commission a group of Talbot County Citizens to discuss the erection of a new statue that is inclusive of Union and Confederate soldiers[.]” The minutes further state that “discussion also ensued regarding the addition of a statue to the Courthouse grounds depicting a Union soldier,” and that “Council discussion ensued with the NAACP representatives and the Council agreed to take [the] group’s recommendations under consideration.”

The Council, by the County Attorney, does not expressly dispute the allegation that it met without giving notice and admitting the public. Instead, the Council states that “control of County-owned property is an administrative function that is exempt from the Act,” and that the placement of monuments on the site is governed by a policy that the Council adopted in 2004 and historic preservation regulations that are applied by the Easton Historic District Commission. The 2004 policy set standards for the placement of monuments on the courthouse grounds, including the restriction of monuments to those that “constitute a collective remembrance” of county residents who “served and/or died in a major war.” The policy places the “appearance, dimension, content and location” of monuments “within the discretion of the Council.” The policy provides that it “shall apply prospectively only.”

### Discussion

The question before us is whether the Council’s deliberations on the location of the statue fall within the “administrative exclusion” to the Act, or whether those deliberations instead implicated functions that the public was entitled to observe. The answer to that question is dispositive of this matter. If the meeting was subject to the Act, the Council violated the Act by failing to provide the public with notice and access to the meeting; if the meeting was not subject to the Act, no violation occurred.

The Act’s two-part definition of “administrative function” is circular: it is the “administration of . . . a law” or a “rule, regulation, or bylaw,” and it is *not* any of the other functions. § 3-101(b).<sup>2</sup> In applying this definition, we have ordinarily deemed a public body’s oversight of its facilities and property to be administrative in nature when that management role lies with the particular public body and the particular discussion does not implicate the development of a new policy. For example, we have found that a school board, expressly empowered to manage school board property, was performing an administrative function when it addressed a developer’s proposal about the placement of a wall between the project and an elementary school. In that case, the school board had already decided, in an open meeting, to request the wall. 3 *OMCB Opinions* 53, 54 (2000). Likewise, we found that a school board performed an administrative function when it listened to the superintendent’s presentation about space planning at a high school. See 3 *OMCB Opinions* 16, 19 (2000); see also 3 *OMCB Opinions* 39, 47 (2000) (finding that briefing on management of school construction project fell within the exclusion).

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<sup>2</sup> Statutory references are to the General Provisions Article (2014, with 2015 supp.) of the Maryland Annotated Code, where the Act is codified. The exclusion itself appears in § 3-103. For an explanation of the two-step analysis required by the definition in § 3-101(b) and examples of our comments on the difficulties that public bodies have in applying it, see pages 16-19 of the Open Meetings Act Manual (November 2015).

The outcome is different when the discussion involves policy decisions. In 3 *OMCB Opinions* 39, for example, a school board discussed a request by an outside group to meet in the school board's offices. That topic, we noted, "[gave] the impression of being merely an administrative housekeeping matter," but "apparently . . . raised questions that the [school board] had to address because there was no policy in place." *Id.* at 45. We concluded that "[i]f this discussion was indeed an aspect of formulating a policy on the use of the [facility] for outside groups' meetings, it should not have been done in closed session."<sup>3</sup> To the same effect, we decided that a public body was not performing an administrative function when it discussed how to accommodate a last-minute request by members of the public to speak at a meeting, because, in that case, the public body "was presented with an administrative issue that it had not previously encountered," and, "if anything, was formulating a new policy to deal with this unanticipated situation." The public body thus was not "administering any identifiable law or policy already in force or effect." 1 *OMCB Opinions* 113 (No. 95-2) (1995) (internal quotation marks omitted).

This matter does not fall comfortably into the administrative exclusion. First, we look to whether the Council was "administering" an adopted law, rule, regulation, or bylaw. § 3-101(b)(1). This part of the definition, we have explained, requires that there be an "identifiable prior law to be administered *and* the public body holding the meeting must be vested with the responsibility for its administration." 5 *OMCB Opinions* 60, 66 (2006). Certainly, the 2004 policy is an identifiable regulation that vests the Council with its administration. The policy also generally leaves the impression that the Council oversees monuments on the courthouse grounds. More precisely, however, the policy by its terms pertains only to the placement of new monuments on the site, and it gave the Council no standards for determining whether to remove a monument that was already there when the resolution took effect. The applicable historic preservation rules are also identifiable regulations, but the Council does not administer them. We conclude that the discussion about whether to remove the statue did not meet the first prong of the definition and therefore did not fall within the administrative function exclusion. A discussion about whether to change the 2004 policy also would not have fallen within the administrative function.

As for the second part of the definition, we recognize that the discussion about what to do with the statue did not fall easily into the functions that are subject to the Act. However, a discussion must meet both parts of the definition to fall within the exclusion. Moreover, doubts about the applicability of the administrative function exclusion to a particular

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<sup>3</sup> We decided that matter without the benefit of closed-session minutes and were unable to resolve several of the allegations. 3 *OMCB Opinions* 39. Until 2004, public bodies were only required to provide us with a written response. *See* 2004 Laws of Md., ch. 440 (amending the Act to require public bodies to provide additional documents).

meeting are to be resolved in favor of openness. *See* § 3-301 (“Except as otherwise expressly provided in [the Act], a public body shall meet in open session); *see also, e.g.,* 1 *OMCB Opinions* 96, 98 (1994) (finding that discussion that fell within none of the functions was subject to the Act).

### **Conclusion**

We have concluded that the Council’s closed session about whether to remove the statue was subject to the Act, and so the Council violated the Act by meeting to address that question without inviting and admitting the public. We have explained that discussions of matters that often fall within the administrative exclusion—for example, management of the public body’s property or meetings—are not invariably exempt from the Act. Instead, the focus of the administrative exclusion inquiry is on whether a particular discussion will involve policy questions not addressed by pre-existing rules.

Open Meetings Compliance Board

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